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NO.

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals misapplied *Hensley v. Eckerhart* when it concluded that Respondents are prevailing parties entitled to an award of attorney's fees.

2. Assuming *arguendo* that Respondents are prevailing parties, what is the proper measure of attorney's fees to be awarded in civil rights actions where substantial monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

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OPINIONS BELOW

The opinion of the three-judge panel of the United States Court of Appeals for the Tenth Circuit filed on July 10, 1985 is reported as *Nephew v. City of Aurora,* 766 F.2d 1464 (10th Cir. 1985). The order of the Court of Appeals for the Tenth Circuit granting Respondents' petition for rehearing and suggestion for rehearing en banc is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit on rehearing en banc filed on October 19, 1987 is reported as *Nephew v. City of Aurora,* 830 F.2d 1547 (10th Cir. 1987) (en banc).

JURISDICTION

The three-judge panel of the Tenth Circuit entered its judgment on July 10, 1985. On March 4, 1986, the Tenth Circuit Court of Appeals granted Respondents' petition for rehearing and suggestion for rehearing en banc, vacated the opinion of July 10, 1985, and stayed briefing until the then-pending decision of the United States Supreme Court in *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), was rendered. On October 19, 1987, the Tenth Circuit Court of Appeals en banc entered its judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable

remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

A. The Factual Background of This Case.

The issues presented to the jury in this case stem from a late evening noise complaint received by the Aurora Police Department, which dispatched two Aurora police officers to respond to the call. Respondents alleged that the two white Aurora police officers who responded to the noise complaint, entered the residence of Respondent Perkins and there, motivated by racial discrimination, assaulted, battered, bruised and falsely arrested Respondents. The facts were in sharp dispute. The police officers contended that they were subjected to assault and battery at the hands of Respondents.

B. The Proceedings in the District Court.

Respondents filed suit against the two Aurora police officers and the City of Aurora for allegedly infringing upon their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, and 1985 (1982). Respondents invoked the jurisdiction of the district court pursuant to 42 U.S.C. § 1983. Respondents alleged that they

had been assaulted, battered and subjected to false arrest by the police officers pursuant to a custom or policy of the City of Aurora to discriminate against blacks.[1] Injunctive and declaratory relief and damages were sought against the City, its Mayor, and its City Council. At the close of the Respondents' case, however, the City, Mayor and City Council were removed from the case when the district court granted their motion for a directed verdict. Significantly, the district court also eliminated injunctive and declaratory relief from Respondents' case because Respondents made no attempt in their case in chief to prove the requisite unconstitutional custom or policy.

The case then proceeded to jury determination under 42 U.S.C. § 1983 based solely on Respondents' damages liability claim. In essence, the only real relief ever sought by Respondents in this case was compensatory and punitive damages in the amount of two million dollars against the two individual police officers. The jury found in favor of Respondents Fulton and Perkins and against Respondents Nephew and Neloms. The jury awarded one dollar ($1.00) each to Respondents Fulton and Perkins and no punitive damages, despite the fact that Respondents' counsel implored the jury during closing argument to award significant monetary damages.

Respondents Fulton and Perkins then moved for attorney's fees under 42 U.S.C. § 1988. The district court apparently reduced the amount sought by a proportion of the time spent on the related state case,[2] and then reduced that amount further on

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[1]Respondents' Complaint was originally filed both individually and on behalf of all persons similarly situated. Prior to trial, the district court dismissed the class action allegations. Respondents filed an Amended Complaint eliminating the class action aspect of the case.

[2]The police officers initially filed suit against Respondents in state court and Respondents counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

the basis that only two of the four Respondents prevailed.[3] Thereupon the district court awarded attorney's fees in the amount of $12,500.00. The district court refused to reduce the attorney's fee award on the grounds that Respondents Fulton and Perkins had each received only one dollar ($1.00).

C. The Court of Appeals' Decision.

Petitioners appealed solely on the issue of the award of $12,500.00 attorney's fees. A divided three-judge panel of the Court of Appeals for the Tenth Circuit[4] held that when a plaintiff seeks substantial monetary damages but is awarded only one dollar ($1.00) the award must be discounted to compensate for plaintiffs' very limited success. (App. C, 12a).

Upon Respondents' petition for rehearing, the Court of Appeals for the Tenth Circuit decided to reconsider the issue en banc in light of the then-pending decision of this Court in *City of Riverside v. Rivera.*

The Court of Appeals for the Tenth Circuit en banc, by a vote of five to three, ruled that the district court's award of attorney's fees in the amount of $12,500.00 was neither clearly erroneous nor an abuse of its discretion, despite the fact that the two "prevailing" Respondents were each awarded only one dollar ($1.00).

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[3]The district court's findings of fact are so brief and conclusionary that it is impossible to determine whether the court used a "lodestar" figure in computing the award of attorney's fees. Nor is it possible to determine the amount of the reductions made by the court for the portion of time spent on the related state case or the reduction made on the basis that only two of the four Respondents "prevailed". (*See* App. A, 1a-7a).

[4]Judge Doyle, who participated in the three-judge panel's decision, died prior to the Court of Appeals' en banc consideration of this case.

REASONS FOR GRANTING THE WRIT

This petition presents narrow, recurring and vitally important questions concerning the award of attorney's fees in civil rights actions where only monetary damages are sought, and insignificant monetary damages are ultimately awarded.

I. The Standard Applied By The Court of Appeals To Determine Whether Respondents Were Prevailing Parties Entitled To An Award Of Attorney's Fees Cannot Be Reconciled With *Hensley* Or With Other Circuits' Interpretation Of *Hensley*.

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Court cited *Nadeau v. Helgemoe*, 581 F.2d 275, 278–279 (1st Cir. 1978), for the formulation of the test used to determine whether a party has prevailed for the purposes of the award of attorney's fees:

> [P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation *which achieves some of the benefit the parties sought in bringing suit.* (Emphasis added).

In a post-*Hensley* decision, the Sixth Circuit adopted an even more restrictive test for "prevailing party" which requires that the plaintiff prevail on "the central issue." *Kentucky Association for Retarded Citizens, Inc. v. Conn*, 718 F.2d 182, 186 (6th Cir. 1983).

Furthermore, in *Hewitt v. Helms*, 55 U.S.L.W. 4907 (U.S. June 19, 1987) (No. 85-1630), this Court continued its exploration of the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988. In that case, this Court held that a prisoner who obtained no relief for claimed violations of constitutional rights was not a "prevailing party" for purposes of an attorney's fee award under 42 U.S.C. § 1988, despite the fact that he received a favorable judicial statement of law during the course of the litigation and that changes were made in prison procedures after his release.

Returning to the test established in *Nadeau* and adopted by the Court in *Hensley*, Respondents are prevailing parties " . . . if they succeed on any significant issue in litigation *which achieves some of the benefits the parties sought in bringing suit.*" 461 U.S. at 433 (Emphasis added). Respondents met the first part of the test in that they succeeded on a significant issue; however, they failed with respect to the second part of the test because they did not obtain the benefits which Respondents sought in bringing the suit —significant monetary damages, either compensatory or punitive.

In the context of the present case, the Court of Appeals found Respondents were successful but failed to consider properly what benefits were achieved. The Court of Appeals misconstrued the thrust of Respondents' case stating "[t]he amount of monetary damages in the present case was less important than the judgment against the police officers' conduct."[5] (App. D, 26a).

The one dollar ($1.00) verdict did not serve as a catalyst for change to benefit Respondents, much less others similarly situated. In fact, Respondents' injunctive and declaratory relief claims against the City, its Mayor, and its City Council did not survive a motion for directed verdict because Respondents made no attempt to prove the existence of an unconstitutional custom or policy. Rather, Respondents attempted to prove only damages for physical injuries which they allegedly received during the incident.

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[5]There is simply no basis for the Court of Appeals' interpretation of the significance of the jury's verdict. No restraining orders or injunctions were issued against any of the Petitioners, and they were not compelled to, nor did they, change any of their practices or policies as a result of this lawsuit. This lawsuit was not aimed at creating new law; rather, it was aimed solely at obtaining significant monetary damages for the Respondents against the two individual police officers. That goal was not achieved. One must question what is the "normal reaction" to this verdict by Petitioners, other police officers, the media, and the community as a whole.

As Senior Circuit Judge Barrett stated in the dissenting opinion (App. D, 28a):

> The majority opinion states that 'the amount of monetary damages in the present case was less important than the judgment against the officers' conduct' in vindication of plaintiffs' civil rights and 'its message to the police department.' Slip Opinion, p. 9 [App. D, 26a]. What civil rights of the plaintiffs were violated? What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subjected to assault and battery, false arrest and outrageous conduct. What, then, is the 'message' the trial court and this court are conveying to the City of Aurora police officers? The question defies a logical, reasonable answer. It was *not* answered by the district court, except in general, undefined platitudes. If the police officers did wrong, they are left groping for guidance and direction. (Emphasis in original).

If this had been a case where injunctive relief was awarded or new law created, Petitioners would not be filing this petition. However, in a case where plaintiffs *sole* purpose is to obtain substantial monetary damages for alleged personal injuries, an award of one dollar ($1.00) reflects only a "moral victory". Such a "moral victory" is of insufficient magnitude to warrant an award of attorney's fees under 42 U.S.C. § 1988. *Huntley v. Community School Board of Brooklyn*, 579 F.2d 738, 742 (2nd Cir. 1978).

The Tenth Circuit's holding markedly departs from the holding in *Hensley* and the holdings of other Circuits. This Court's review is necessary to resolve this conflict and to define more precisely the parameters within which a plaintiff may be deemed a "prevailing party" entitled to an award of attorney's fees under 42 U.S.C. § 1988.

II. Assuming *Arguendo* That Respondents Are Prevailing Parties, The Award Of Attorney's Fees Must Be Discounted To Compensate For Their Very Limited Success.

Following the jury's award of two dollars ($2.00) to Respondents Fulton and Perkins, Respondents' counsel was awarded attorney's fees in the amount of $12,500.00. While this award may not be disproportionate to the number of hours actually expended by counsel, this award is grossly disproportionate to the degree of success achieved by Respondents.

Upon Respondents' petition for rehearing, the Court of Appeals decided to stay briefing and to reconsider this case en banc after this Court announced its decision in *City of Riverside v. Rivera*. The Court of Appeals, however, misapplied *Rivera* in holding that the district court did not abuse its discretion when it failed to reduce the attorney's fee award because the two prevailing Respondents each were awarded only one dollar ($1.00).

In *Rivera*, this Court, in a plurality opinion, declined to adopt a strict proportionality rule for the award of attorney's fees under 42 U.S.C. § 1988. More importantly, however, this Court reaffirmed that *Hensley* indicates the factors to be considered in awarding attorney's fees under 42 U.S.C. § 1988.[6] In *Hensley*, this Court explicitly stated that one "important factor" in determining the "reasonableness" of a fee award is the "results obtained". 461 U.S. at 434. This Court further explained (*id.*):

> This factor is particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief.

[6]The 12 factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the

(Footnote continued on next page)

In his concurring opinion in *Rivera*, Justice Powell addressed the issue of the proper measure of attorney's fees to be awarded plaintiffs under 42 U.S.C. § 1988 where award of *private damages* is the purpose of a civil rights litigation (54 U.S.L.W. at 4851 (Powell, J., concurring)):

> . . . The facts and circumstances of litigation are infinitely variable. Under *Hensley*, of course, 'the most critical factor [in the final determination of fee awards] is the degree of success obtained.' 461 U.S., at 436. *Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.* (Emphasis added).

Only Respondents' claims for compensatory and punitive damages in the amount of two million dollars reached the jury. Because only Respondents' claims for private damages reached the jury, this case should properly be considered one for private damages.[7]

In his concurring opinion in *Rivera*, Justice Powell further observed that "[i]t probably will be the rare case in which an award

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(Footnote continued from previous page)
experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. These factors were first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The Supreme Court in *Hensley* noted that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." 461 U.S. at 434 n. 9.

[7]This case is clearly distinguishable from *Rivera* in that here there was no benefit to the public interest by an award of two dollars ($2.00) private damages. In contrast, the jury in *Rivera* returned 37 individual verdicts in favor of the plaintiffs and against the City of Riverside and five police officers, and plaintiffs were awarded $33,350.00 in compensatory *and* punitive damages. Further, the district court in *Rivera* observed that even though the plaintiffs ultimately dropped their request for injunctive relief, the defendants' misconduct clearly would have warranted an injunction. *See* 54 U.S.L.W. at 4846, 4848 n. 7.

of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." 54 U.S.L.W. at 4852 n. 3 (Powell, J., concurring) (Emphasis in original). In *Rivera,* the attorney's fees award was roughly seven times the compensatory and punitive damages award. In this case, the attorney's fee award is 6,225 times greater than the award of damages.

In addition, in making its $12,500.00 attorney's fee award in this case, the district court erroneously relied upon the following dicta in *Ramos v. Lamm,* 713 F. 2d 546, 557 (10th Cir. 1983):

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice.

This dicta, which was also the cornerstone of Judge McKay's dissenting opinion in *Nephew v. City of Aurora* (App. C, 13a-17a), clearly conflicts with the express language of *Hensley* and *Rivera.* As Senior Circuit Judge Barrett noted in the dissenting opinion (App. D, 33a):

> Significantly, Judge McKay does not cite to *Ramos v. Lamm* in his opinion for the en banc court, even though it was the basis for his dissent from the original panel opinion in this case and even though the district court stated that it was guided and governed by *Ramos v. Lamm.* (R., Vol. II, pp. 2, 8, 9).

In this case, Respondents success was so minimal that even the "reduced" attorney's fee award of $12,500.00 is unconscionable. While it is arguable that Respondents Fulton and Perkins are technically "prevailing parties", the extremely limited success they achieved bears no reasonable relationship to the amount of attorney's fees awarded and demonstrates conclusively that the district court not only failed to give "primary consideration" to the "results obtained" factor set forth in *Hensley,* but refused to

give this crucial factor any consideration whatsoever. Thus, the Tenth Circuit's opinion conflicts with this Court's holdings in *Hensley* and *Rivera*. This Court's review is necessary to resolve this conflict.

III. The District Court's Ruling Is So Vague That Attorney's Fees Cannot Be Assessed On The Basis Of That Ruling.

In *Rivera*, on appeal on the issue of attorney's fees alone, this Court vacated judgment and remanded the case for reconsideration in light of the *Hensley* decision. After additional hearings, the district court, on remand, made extensive findings of fact and conclusions of law and again concluded that plaintiffs were entitled to attorney's fees, based upon the same hours and rates. On appeal, this Court affirmed, expressing the view that the district court had correctly applied the factors announced in *Hensley* in calculating the award.

In this case, the Court of Appeals' decision violates the *Rivera* requirement that the district court's findings be sufficiently precise to assure that the court correctly applied the factors announced in *Hensley*. While the Court of Appeals here failed to address the issue except in conclusory terms (App. D, 25a), it is obvious that the district court's findings, which the Court of Appeals affirmed, are not sufficiently precise to allow an appellate court to determine how they were calculated. By way of illustration, it is not possible to determine from the court's findings the amount of the reduction which was made by the district court for the portion of time spent on the related state case, or the reduction made on the basis that only two of the four Respondents prevailed.

No matter how much discretion the district court retains to award attorney's fees, the parties are entitled to fair and reasonable consideration of the issue. The district court is required to

articulate its consideration of the factors announced in *Hensley* to ensure the possibility of meaningful appellate review. For this additional reason, the decision below conflicts with *Rivera*.

IV. The Court Of Appeals' Decision Will Undermine The Purposes Underlying 42 U.S.C. § 1988.

The twin purposes of 42 U.S.C. § 1988 are to provide meaningful access to the judicial process by private individuals with civil rights grievances, and to force attorneys to critically evaluate the prospects of success of their claim. (App. C, 12a). As to the purposes of 42 U.S.C. § 1988, the Tenth Circuit Court of Appeals in *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc), was quite specific:

> Beyond providing a reasonable evaluation of a lawyer's services, the approach set forth in *Hensley* advances the general intendment of section 1988, providing incentive for *meritorious* civil rights litigation. It instructs a lawyer to critically evaluate the prospects of success in each potential civil rights claim, and it encourages the lawyer to proceed only with those claims that are indeed meritorious. The lawyer can go forward with difficult arguments, confident that the client's fee award will reflect the obstacles that the attorney overcomes. *The lawyer can go forward with nonmonetary claims, secure in the knowledge that the fee award will not be diminished on account of the absence of damages.* (Emphasis added).

A refusal to confer "prevailing party" status upon plaintiffs seeking only a substantial monetary award who ultimately receive an insignificant monetary award will not undermine the laudable purposes of 42 U.S.C. § 1988. On the other hand, by refusing to consider the "results obtained" factor set forth in *Hensley* and reaffirmed in *Rivera*, the Court of Appeals' decision undermines one of the purposes underlying 42 U.S.C. § 1988, which is to force attorneys to critically evaluate the prospects of success of their claim.

Indeed, if the Court of Appeals' decision goes unreviewed at this time, the ultimate outcome will be a total erosion of this important purpose. Without the presence of both of the twin purposes underlying 42 U.S.C. § 1988, the balance which is essential to the fair and equitable assessment of attorney's fee awards in civil rights actions will disappear. This Court should grant certiorari to insure that such a result does not occur.

CONCLUSION

In this case, Respondents received no declaratory or injunctive relief, no class action determination, no court supervised operation of the police department for implementation of remedial measures, no determination of an unconstitutional custom or policy and no punitive damages. Respondents did receive an award of attorney's fees which was 6,225 times the damage award in the case. This is not a disproportionate fee award of the type addressed in *Rivera;* this is an unconscionable fee award. Simply stated, such an inequitable and unjust attorney's fee award cannot be allowed to stand.

42 U.S.C. § 1983 is, and should be, a potent weapon in enforcing the law of the land. In such actions, attorney's fees represent an inherent deterrent. The *Rivera* decision motivated respect on the part of policy makers because it served notice that civil rights plaintiffs who prevail on a significant claim will receive attorney's fees, even if those fee awards are not strictly proportional to the results obtained. In this case, the Court of Appeals crossed the line between a disproportionate fee award and an unconscionable fee award. When analyzed objectively, the Court of Appeals' holding serves only to encourage attorneys to ignore the "results obtained" factor in civil rights cases where private damages alone are sought.

The Court of Appeals' opinion does violence to this Court's holding in *Hensley* and *Rivera,* as well as conflicts with the holdings of other Circuits. Where substantial monetary damages alone

are sought, a "moral victory" of an inconsequential monetary award should not entitle the plaintiff to an award of attorney's fees.

If Respondents are "prevailing parties", the Court of Appeals' refusal to properly consider the "results obtained" factor undermines the purposes underlying 42 U.S.C. § 1988. Undoubtedly, the Court of Appeals decision will lead to the assessment of unconscionable fee awards in civil rights cases where monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

In short, this case represents an ideal opportunity for this Court to further define the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988. Review in this case is also necessary to insure that fair and equitable attorney's fee awards are made in civil rights actions where substantial monetary damages are sought, and insignificant monetary damages are ultimately awarded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marcia G. O'Brien, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the eighteenth day of December, 1987, I served copies of the foregoing Petition for Writ of Certiorari on Respondents, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, by depositing copies of the Petition for Writ of Certiorari in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to their counsel of record:

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APPENDIX "A"

IN THE

UNITED STATES DISTRICT COURT

For The District of Colorado

Civil Action No. 81-M-816

JEWELL NEPHEW, et al.,

Plaintiffs,

v.

THE CITY OF AURORA, et al.,

Defendants.

REPORTER'S TRANSCRIPT
COURT'S RULING

Proceedings before the HONORABLE RICHARD P. MATSCH, U.S. District Judge, United States District Court for the District of Colorado, beginning at 1:30 o'clock p.m. on the 22nd day of July, 1983, in Courtroom 202, United States Courthouse, Denver, Colorado.

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PROCEEDINGS

THE COURT: I am ready to rule in this matter. Not because I am confident of the ruling; quite to the contrary. I think there is, with exception for the problem of determining the appropriate sentence to confinement in criminal cases, no more difficult problem for judges these days than the determination of an appropriate fee award under 42 United States Code, Section 1988.

The difficulties, of course, are obvious and apparent to us all, and I, in this regard, applaud the effort of Judge Logan in the Tenth Circuit Court of Appeals in the *Ramos against Lamm* case where really in response to something of a plea made by another judge in this Court for guidance in dealing with these questions, the Circuit—this panel of this Circuit—did attempt to give us guidance, and did indeed set out an outline of the steps to be followed in making the analysis.

Now with respect to the matter of carefully constructing contemporaneous time records and the like, I do read that as prospective. We are advised by the Circuit to advise lawyers in the future that fee awards would be considered only upon the basis of meticulous, contemporaneous time records, so in that regard I am not going to use any reduction because of the nature of the time records that have been summarized in the motion that's now before me, and as I understand Defendant's counsel, it is not a serious dispute about time records in this case, anyway. The dispute relates to the compensation for certain services.

I think the matter that gives me the greatest trouble, perhaps, and the area in which I might have some dissent, if I had the power to dissent, with some of the language in *Ramos,* is the section in which the Court, the panel for the Court, and speaking through Judge Logan, discusses the nature of civil rights litigation, and I am trying to find the exact statement here.

Yes. In the language in the opinion referring to the volume of civil rights cases filed in federal courts, according to the statistics

kept by the Administrative Office and the numbers of appeals and such litigation, and the statement that this valid litigation indicates that civil rights litigation has become a common specialty.

Now, of course, the Court in that case was considering prison conditions as the type of civil rights litigation involved, but I think it's fair to make some observations based upon my own experience with civil rights litigation involving lawsuits with police departments and police officers that there is a special attention involved in that kind of lawsuit.

And I am not saying this in a manner that is accusatory of police. I don't want to be suggesting that I have preconceptions with respect to one side or the other of such cases, but they are difficult trials. They are difficult for me as a trial judge, at any rate, because they involve highly emotional situations.

They involve potential for great violence in a community, and we are aware of the recent history of the United States and in communities in this republic where what may have started as minor incidents erupted into major disobedience and destruction. And there is always that potential.

And in many respects it's my opinion that for our Courtrooms to be open to these lawsuits, and for those events to come forward and be resolved by a jury in the relative quiet of courtrooms, and utilizing the adversary process, we have done a great deal to preserve order in the United States.

But the persons who are often plaintiffs in these cases are not—it's not like representing a tax client in a case that involves a lot of money in this dispute with the Internal Revenue Service over a tax shelter program or something of that nature.

You are talking about people who take the witness stand and testify, and testify about something that recreates time in their lives when there was great emotion and perhaps great danger.

The same is true with the police officers. And they confront each other here in a courtroom, and it's difficult. It's difficult for counsel on both sides.

And I think sometimes when you engage in litigation against police departments there is a lot of looking in your rear view mirror when you drive down the street.

Now, I say that because I think that it is not true that the ordinary, competent trial lawyer, if there is one, and I am not saying that disparagingly, it's just that I don't know where that standard fits in because most of us who engage in trial practice are involved within specialties within trial work. Trial work itself does not seem to be a specialty.

We have plaintiff's lawyers and defendant's lawyers in connection with personal injury litigation, and a lot of other categories of trial practice, so I don't know what is the reasonably competent general trial attorney anymore.

But I don't think that 1983 litigation is something that can be handled effectively by "an ordinarily competent trial attorney."

Some mention has been made about an excess amount of research with respect to 1983. Any lawyer or any judge, for that matter, who comes into the Courtroom to try a 1983 case who hasn't spent some time reading the most recent 1983 cases is ill prepared.

What all of us know is that the Supreme Court of the United States, and certainly all of us below it, have a lot of trouble trying to articulate what is a claim for relief and what are the defenses in these cases in which we have the challenge to official conduct as an infringement of individual liberty.

I spend more time reading cases under 1983 in Bivins and this area of the law than I think I read any other type of case, and it's simply indicative of the struggle to try to articulate standards that can be utilized in the trials of these matters.

The comparison between state law torts and constitutional rights. When is a matter a matter of simply assault and battery or false arrest, and when is it a matter under the Fourteenth Amendment.

Well, I don't think we in the courts have done a very good job of giving that guidance, and I am including myself in that lament.

So, I think 1983 litigation is difficult, and it is, I think, a type of case in which most lawyers don't venture. What I am saying is that it's my finding and conclusion that this is an area of some specialization, and that the lawyer seeking the payment in this case, Mr. Penfield Tate, has been in this Court in many such cases and other types of civil rights litigation, and I would expect his hours to be productive toward the objective of his clients in the case.

With respect to measuring the question of how much success was achieved, as we must, compared to the scope of the litigation, I find a lot of trouble with that in that in these days, and this is something in common I think as the civil rights cases that have in common with all other litigation, we have so many lawyers now, and there is sufficient amount of cannibalism among lawyers, that every complaint almost has to meet the requirements of the medical analogy and medical equivalent of a brain scan. If you don't claim everything that you could possibly claim in a case, including injunctions and everything else, somebody down the road may say you haven't been competent in your representation of your client.

So, measuring the final result by a verdict against the original complaint has to be done with, I think, some considerable skepticism about what was reasonably expected at the beginning, and I think that again we have somewhat diluted Rule 11 by the way in which we practice law, and may be required to practice law under modern conditions.

The principal problem in this case for me is how to evaluate this related state case. I have no trouble with discounting certain aspects of that state case as, for example, I don't think that we should consider the time spent in getting ready to pick a jury, and then ultimately resulting in a mistrial because of what apparently was a trial inefficiency in the state court, and I am not saying that to condemn the state court, but when you look at the award of an attorney's fee, of course, you have to conside that the other side has to pay it. There are two sides to the attorney's fee award always; the payor and the payee. I don't think that the Defendants are responsible for that lost time.

Mr. Kelly has expressed the opinion that these lawsuits were essentially one lawsuit, and, of course, they did arise out of a common set of operative facts, no question about that. It was the same series of events on the same night which led to these two cases.

And in one situation the police got to court first, and in the other situation the second parties to court just sort of by the difference in the way the courts operated, I guess, the plaintiffs here got to trial first. The trial that went on through.

We also had four plaintiffs in this case, and two of them prevailed, not four. So I think some discounting is required for the fact that two of these plaintiffs lost their case.

With respect to the amount of the award, I am governed by the Tenth Circuit opinion in that, as I indicated to counsel, to Mr. Richardson in his argument. But I also agree with it.

It is not really so much how much money a jury decides to give or I shouldn't say give—to award—as it is a determination in the court of law by a jury as to who was right under the circumstances, and labeling in this case the conduct of the police, these two police officers as it relates to these two plaintiffs who did prevail at trial, that in this circumstance the police were wrong. That's important.

It's important for the police as well as for the plaintiffs because it gives us an indication through these representatives of the community of what standards of police conduct should prevail, and that serves—I hope that serves—as some guidance for the police with respect to how they perform their difficult task.

These are the things that I have considered, and I don't believe that I can quantify them further rather than by simply saying that in my judgment, given the fact that we had four plaintiffs, we had two lawsuits, two different court actions, that who did prevail essentially got what amounts to a declaratory judgment through the jury verdict, that the appropriate standard for the reasonable time for the prevailing plaintiff is 100 hours, and the appropriate fee is $125 an hour, and I am awarding $12,500, and with that I am going to enter judgment on the verdicts and on this fee award.

With respect to Mr. Kelly's time, the Tenth Circuit case does say that expert witness fees are not compensable, and, accordingly, it would not be appropriate to amend your application, Mr. Tate, to ask for a fee for him as a witness.

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APPENDIX "B"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON,

Plaintiffs-Appellees,

v.

CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Civil Action No. 81-M-816)

Submitted on the Briefs:

Penfield W. Tate, II, of TRIMBLE, TATE & NULAN, Denver, Colorado, Attorneys for Plaintiffs-Appellees.

Charles H. Richardson, Patrick E. Kowaleski, and Kathleen M. Schoen, Aurora, Colorado, Attorneys for Defendants-Appellants.

Before BARRETT, DOYLE, and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a), Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The issue in this appeal concerns the proper measure of attorney's fees to be awarded a prevailing party under 42 U.S.C. § 1988. Plaintiffs here sought to prove at trial that they were assaulted, battered, and falsely arrested by Aurora, Colorado (the "City"), police officers pursuant to a custom or policy of the City to discriminate against blacks. Injunctive and declaratory relief and damages were sought against the City, its Mayor, and its City Council; at the close of the plaintiffs' case, however, the City, Mayor, and City Council were removed from the case upon the district court's grant of their motion for a directed verdict.

The case then proceeded to trial on the plaintiffs' claims for compensatory and punitive damages in the amount of $2 million against the individual police officers. The jury found in favor of plaintiffs Fulton and Perkins and against plaintiffs Nephew and Neloms. The jury awarded one dollar ($1.00) each to Fulton and Perkins as compensatory damages; no punitive damages were awarded.

In its ruling upon Fulton and Perkins' motion for attorney's fees, the district court reduced the amount sought by a portion of the time spent on a related state case,[1] and then reduced that amount further on the basis that only two of the four plaintiffs prevailed. The district court expressly refused to reduce the award, as the defendants urged, on the grounds that plaintiffs Fulton and Perkins had won only nominal damages. Accordingly, the court awarded $12,500 as a reasonable fee under the circumstances. The issue therefore becomes whether, in a § 1983 case in which plaintiffs proceed only to litigate monetary damages, the attorney's fees awarded should be reduced if the plaintiffs in fact are awarded only nominal damages of $2.00.

[1]The police officers, Thomison and Peterson, were the first to file suit as a result of the underlying incident in this case. Their suit in state court for assault and battery was eventually dismissed by stipulation; the case then proceeded to trial in federal court under 42 U.S.C. § 1983 based on the plaintiffs' combined claims.

Although this Court has on many occasions examined the proper measure of attorney fees under 42 U.S.C. § 1988, it has yet to address the precise issue presented in this appeal. There is language in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), stating that fee awards should not be reduced under the circumstances of the present case: "Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice." In *Ramos* this reasoning was justified on the basis that "[p]arties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit." *Id.* The plaintiffs in the present case argue that the district court's award of attorney's fees should therefore not be reduced because the jury did in fact find that their constitutional rights had been violated, thus vindicating their primary purpose in bringing suit.

Ramos was not the proper vehicle for this Court to expound on the significance of a nominal monetary recovery in a § 1983 suit in which substantial damages are sought. Monetary damages were not at stake in *Ramos*. Rather, *Ramos* was a suit that concerned the constitutionality of conditions in Old Max, Colorado's maximum security prison. The plaintiffs there sought only declaratory and injunctive relief—as opposed to damages—because of the antiquated and inadequate conditions of the prison. Thus, the language from this Court's *Ramos* opinion quoted above is dicta. It is not binding precedent as to the issue with which we are here confronted.

It is our view that the quoted language from *Ramos*, while dicta, does not fully address the purposes underlying the attorney's fees provision in the civil rights laws. The purpose of § 1988 is not simply "to encourage private enforcement of the civil rights laws," *Id.* at 557, even though such might be viewed as a fair

statement of the purpose behind the civil rights laws generally. But as to the purpose of § 1988 in particular, this Court has been specific:

> Beyond providing a reasonable evaluation of a lawyer's services, the approach set forth in *Hensley* advances the general intendment of section 1988, providing incentives for *meritorious* civil rights litigation. It instructs a lawyer to critically evaluate the prospects for success in each potential civil rights claim, and it encourages the lawyer to proceed only with those claims that are indeed meritorious. The lawyer can go forward with difficult arguments, confident that the client's fee award will reflect the obstacles that the attorney overcomes. The lawyer can go forward with nonmonetary claims, secure in the knowledge that the fee award will not be diminished on account of the absence of damages.

Cooper v. Singer, 719 F.2d 1496, 1502 (10th Cir. 1983) (in banc) (emphasis added).

Although *Cooper* was decided after *Ramos*, both were based on the Supreme Court's reasoning in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, after adopting a typical formulation of the term "prevailing party"[2] for purposes of the award of attorney's fees, the court proceeded to describe several factors to be considered in determining a reasonable fee award. One "important factor" in determining the "reasonableness" of a fee award is the "results obtained." *Id.* at 434. If the plaintiff obtains excellent results, his attorney should receive a fully compensatory fee. *Id.* at 435. If, on the other hand, the plaintiff achieves only limited success, simply multiplying "the hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436. As the Court explained: "Congress has not authorized an award of fees whenever it was rea-

[2]"[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. at 433.

sonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." *Id.*

While we have no trouble finding that the plaintiffs in the instant case are the prevailing parties even though they won only nominal damages, *see, e.g., Skoda v. Fontani,* 646 F.2d 1193 (7th Cir. 1981), we conclude that the district court, in determining the reasonableness of the fee award, abused its discretion by not discounting the fee award in light of the fact that plaintiffs won only nominal damages. Other courts have followed such an approach, *see, e.g., Burt v. Abel,* 585 F.2d 613, 618 (4th Cir. 1978); *Perez v. University of Puerto Rico,* 600 F.2d 1 (1st Cir. 1979). We believe this approach furthers the twin purposes of § 1988 of providing meaningful access to the judicial process to private individuals with civil rights grievances and of forcing attorneys to critically evaluate the prospects of success of their claim. We recognize that this holding will likely compel attorneys to prognosticate with some degree of accuracy their prospects of success in terms of dollars and cents. Even so, we believe it to be a necessary burden in an attempt to ensure that attorneys pursue only meritorious civil rights claims.

By this holding we do not imply that an award of nominal damages necessarily means that a corresponding fee award must also be nominal. However, where, as here, a plaintiff seeks substantial damages but wins only nominal damages, the award must be reduced to account for the plaintiffs' very limited success.[3]

REVERSED AND REMANDED.

No. 83-2053—NEPHEW, et al. v. CITY OF AURORA, et al.

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[3]As the Supreme Court recognized in *Hensley,* there is no precise rule for making this determination. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." 461 U.S. at 436-437.

McKAY, Circuit Judge, dissenting:

The issue in this case is whether attorneys' fees awarded under section 1988 should be reduced when the plaintiffs were awarded only nominal damages in a civil rights suit seeking only monetary damages.

Four plaintiffs brought this suit against the City of Aurora, its mayor, city council, and several individual police officers, alleging that they had been assaulted, battered and falsely arrested by the police officers pursuant to a city custom or policy to discriminate against blacks. The city, mayor and city council were dismissed from the case at the close of plaintiffs' evidence, and the case proceeded to trial on plaintiffs' claims for compensatory and punitive damages against the individual police officers. The jury found in favor of two of the plaintiffs and against the other two, and awarded the two prevailing plaintiffs one dollar each in compensatory damages.

The trial court, in setting the attorneys' fees, reduced the requested award to reflect time spent on a related state court action, and reduced it further because only two of the four plaintiffs had prevailed. The court refused, however, to reduce the award to reflect the fact that the plaintiffs had won only nominal damages.

The majority reverses the district court, holding that the attorneys' fee must be reduced "to account for the plaintiffs' very limited success." Maj. Op. at 6. To reach its decision, the majority expressly rejects language to the contrary in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), in which this court stated that:

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. *We reject this practice.* The amount of the monetary recovery is not as significant as the policy being vindicated. Section 1988 was designed to encourage private enforcement of the civil rights

> laws. Parties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit.

(emphasis added). I believe that the result reached by the majority is inconsistent with the case law and undermines the intent of the civil rights laws. Accordingly, I must dissent.

The primary purpose of section 1988 is "to encourage private enforcement of the civil rights laws," *Ramos*, 713 F.2d at 557, and to provide "incentives for meritorious civil rights litigation." *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983). To achieve this dual purpose, the Supreme Court held in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Similarly, in *Cooper*, this court stated that "the fee award must be tied to the reasonable value of the services rendered in light of the results achieved." 719 F.2d at 1501.

The majority finds that, where monetary damages are sought, the "success" of the suit is a function of the damages actually awarded and that *Cooper* and *Hensley* thus require the court to reduce the fee to reflect the fact that the plaintiffs succeeded in proving only nominal damages. I cannot agree. Civil rights suits seek primarily to vindicate constitutional rights. The amount of monetary damages awarded is not, and should not be, the measure of the success of a suit in achieving that goal.

In *Hensley*, the issue was whether a plaintiff who had raised several issues or claims and had prevailed on only some of those issues could recover fees for legal services on the unsuccessful claims. Because plaintiffs are considered "prevailing parties" for purposes of awarding attorneys' fees if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit," *Hensley*, 461 U.S. at 433

(quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)), attorneys' fees may be awarded if a plaintiff succeeds on only one of many issues or claims. In such a case, the Court felt that it would be a windfall to the attorneys to award fees for time spent pursuing all of the claims, the majority of which were not successful. *See* 461 U.S. at 436 ("had respondents prevailed on only one of their six general claims . . . a fee award based on the claimed hours clearly would have been excessive"). In addition, the Court feared that attorneys would be encouraged to pad their meritorious claims with non-meritorious ones if they felt that they could recover fees for all of the time they expended on the case if their one meritorious claim succeeded.

The district court has followed the mandate of *Hensley* by reducing the award to reflect the fact that some of the time was spent pursuing claims for the two plaintiffs who did not prevail. As for the prevailing plaintiffs, however, *Hensley* does not require that their fee awards be reduced. The prevailing plaintiffs brought only one claim—a claim seeking to vindicate their right to be free of officially sanctioned discrimination. The jury found in their favor on this claim. The fact that they did not prove that they were monetarily harmed by the unconstitutional treatment does not alter the fact that they were fully successful in proving the one constitutional claim that they raised.

Ramos v. Lamm was decided after, and relied on, the decision in *Hensley*. It was thus with full awareness of the Supreme Court's reference to "results obtained" that this court wrote that "[t]he amount of the monetary recovery is not as significant as the policy being vindicated." 713 F.2d at 557. The public policy against constitutional violations is vindicated whenever a defendant is found to have acted unconstitutionally, regardless of whether the plaintiff is found to have been monetarily harmed.

The language in *Cooper v. Singer* on which the majority relies in rejecting *Ramos* simply cannot support its conclusion. Rather, it simply parallels the decision in *Hensley* that where a plaintiff

has brought a number of different claims and has succeeded in only some of those claims, the fee award should take into account the plaintiff's limited success. It does not indicate that the fee should be reduced to reflect the amount of damages awarded. Indeed, in *Cooper* the court twice approvingly cited *Ramos'* articulation of the factors to be considered in setting fee awards—an articulation which explicitly rejected the analysis the majority adopts. *See Cooper*, 719 F.2d at 1501 n.8 (referring to the indication, in *Ramos*, of factors "that will result in *reduction* or enhancement of the fee award"), 719 F.2d at 1507 (emphasis added). Thus *Cooper*, on which the majority relies in rejecting *Ramos*, actually supports the proposition that *Ramos* is the correct interpretation of the law.

It is because of society's interest in the enforcement of constitutional rights, even when there has been *no* monetary harm, that the majority of the courts have held that a plaintiff is a "prevailing party" entitled to attorneys' fees when only nominal damages have been awarded. *See, e.g., Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613, 618 (4th Cir. 1978).* I think that similar considerations mandate that a fee award not be reduced simply because only nominal damages have been awarded. Congress explicitly stated that the fees awarded should not be reduced because the rights involved may be nonpecuniary in nature. S. Rep. No. 1011, 94th Cong. 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. The right not to be subjected to discrimination is difficult to measure in monetary terms. As in the area of procedural due process, where the Supreme Court has expressly held that due process

*The majority follows these cases in finding that the parties are prevailing parties entitled to fees despite the fact that they received only nominal damages. What both these cases and the majority opinion fail to recognize, however, is that the policy of encouraging private citizens to enforce their constitutional rights and the importance to society that constitutional rights be vindicated—the factors which lead them to view the parties as prevailing parties despite the award of nominal damages—lead to the further conclusion that attorney's fees should not be reduced because only nominal damages were awarded.

violations should be actionable for nominal damages "because of the importance to organized society that procedural due process be observed," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), society has an interest in ensuring that individuals do not suffer from officially sanctioned discrimination. This interest is vindicated whenever a plaintiff proves, in open court, that he or she has suffered discrimination. To make the fee commensurate with the monetary damages awarded for the constitutional violation would undervalue the importance of this interest and would overemphasize the importance of damages in civil rights litigation. *Cf. Cooper*, 719 F.2d at 1503 (finding that limiting section 1988 awards to the maximum recoverable under contingent fee contracts would overemphasize the importance of damages).

In addition, to reduce the fee award because the plaintiff, who has been constitutionally wronged but did not seek injunctive relief, did not succeed in proving monetary damages would discourage lawyers from representing plaintiffs in pursuit of claims with little monetary value. As Congress made clear in enacting section 1988:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S. Rep. at 5910.

It is undeniable that the jury found two of the plaintiffs had suffered discrimination at the hands of police officers acting under color of state law. This verdict, with or without the award of monetary damages, is a vindication of the societal interest in enforcement of the civil rights laws. Because I believe this court should continue to follow the views expressed in *Ramos*, I would affirm the district court's refusal to consider the amount of damages awarded as a factor in setting attorney's fees. In addition, I would award the plaintiffs additional attorney's fees for the cost of prosecuting this appeal. Accordingly, I must dissent.

APPENDIX "C"

JANUARY TERM—March 4, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, CHARLES FULTON, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

vs.

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL; STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the Court orders as follows:

1. The petition for rehearing is granted by the panel that rendered the decision sought to be reheard.

2. The opinion of this Court issued July 10, 1985, is hereby withdrawn.

3. The judgment of this Court filed July 10, 1985 is hereby vacated.

There shall be no briefing in the case pending further order of this Court and the decision of the Supreme Court in *Rivers v. City of Riverside*, 106 S. Ct. 244 (1985), *see* U.S.L.W. 3232 & 3270 (1985).

The court was polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, and the suggestion for rehearing en banc is granted.

Judge Moore did not participate.

Judges Barrett, Tacha and Baldock voted to deny rehearing en banc.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS, *Clerk*

APPENDIX "D"

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

v.

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL; STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

OPINION ON REHEARING EN BANC

Marcia G. O'Brien (Patrick E. Kowaleski, Charles H. Richardson and Kathleen M. Schoen also on the briefs), Aurora, Colorado, for Defendants-Apellants.

Penfield W. Tate, II, Denver, Colorado, for Plaintiffs-Appellees.

Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA and BALDOCK, Circuit Judges.

McKAY, Circuit Judge.

We consider, en banc, the issue of an appropriate measure of attorney's fees under 42 U.S.C. § 1988 when the sole recovery to

the prevailing party in the underlying action is an award of nominal damages.

Plaintiffs, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, filed suit against two Aurora police officers and the City of Aurora for infringing upon their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, 1985 (1982). Plaintiffs alleged they had been assaulted, battered and subjected to false arrest by the police officers pursuant to discriminatory policies against blacks sanctioned by the Mayor, City Council and City of Aurora. Plaintiffs sought compensatory damages, punitive damages and injunctive relief. The district court directed a verdict in favor of the Mayor and City Council at the end of plaintiffs' case. The jury subsequently found in favor of the police officers with respect to two plaintiffs but found the constitutional rights of the remaining plaintiffs had been violated. The jury awarded each of the prevailing plaintiffs nominal damages of $1.

Plaintiffs then moved for attorneys' fees under 42 U.S.C. § 1988 (1982).[1] The district court reduced the number of hours requested by a portion of time spent on a related state case[2] and because only two of the four parties prevailed. The court awarded $12,500 in fees to plaintiffs for 100 hours work at a rate of $125 per hour. On appeal, a divided court held that when a plaintiff seeks substantial damages but is awarded only nominal damages, the award must be discounted to compensate for plaintiffs' very limited success. *Nephew v. City of Aurora*, 766 F.2d 1464, 1467 (10th Cir. 1985). Upon petition for rehearing, we decided to

[1]42 U.S.C. § 1988 (1982) provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2]The police officers initially filed suit against plaintiffs in state court and plaintiffs counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

reconsider the issue en banc in light of the recent Supreme Court decision in *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986).

I.

Section 1988 was created by the Civil Rights Attorney's Awards Act of 1976, Pub. L. No. 94-559, 1976 U.S. Code Cong. & Admin. News (90 Stat.) 2641. The legislative history behind the bill refers to the appropriate standard for determining fees as the twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[3] *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 8; S.R. No. 1011, 94th Cong. 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913. The Senate Report also states that attorneys' fees should not be reduced because the rights involved may be nonpecuniary in nature. That accords with comments in *Johnson* that consideration of the amount of damages awarded should not "obviate court scrutiny of the decision's effect on the law." 488 F.2d at 718.

The Supreme Court's first opinion in the area, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), considered whether "a partially prevailing plaintiff [could] recover an attorney's fee for legal services on an unsuccessful claim." *Id.* at 426. The lodestar incorporates many of the *Johnson* factors and is considered the reasonable fee required by section 1988. Once determined, however, the figure can be adjusted upward or downward, according to certain factors, one of the most important of which is the "results

[3]The factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill necessary to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

obtained." *Id.* at 434. In *Hensley* the Court remanded the case because the district court had not properly considered the results obtained. Although the Supreme Court held that the extent of a plaintiff's success is a crucial factor in determining attorneys' fees, the court did not bar the award of fees for unsuccessful claims. Instead it cautioned that "the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

In *Rivera,* the Court affirmed the application of the lodestar to a civil rights action in which a plaintiff recovers only monetary damages. Plaintiffs initially sued the City of Riverside, its police chief and thirty police officers on several state claims and alleged violations of their constitutional rights. Plaintiffs sought compensatory and punitive damages and injunctive relief. The court dismissed suits against seventeen of the officers on motion. The jury found in favor of plaintiffs and against the City and five of the officers. It awarded plaintiffs $33,350 in compensatory and punitive damages. The district court awarded attorneys' fees of $245,456.25 to plaintiff: 1,946.75 hours at $125 per hour and 84.5 hours at $25 per hour for law clerks. The Supreme Court remanded the trial court's initial award for reconsideration in light of *Hensley.* The district court arrived at the same conclusion and was affirmed on appeal. Defendants appealed again to the Supreme Court.

A five-member majority affirmed the trial court's fee award, but the majority was divided in its analysis. Justice Brennan, writing for the plurality, initially focused on *Hensley's* characterization of the nature of "results obtained," "[w]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Rivera,* 106 S. Ct. at 2692 (quoting *Hensley,* 461 U.S. at 435). Extending the *Hensley* analysis to *Rivera,* the opinion explicitly rejected defendant's contention that the lodestar

approach was inappropriate to a civil rights action in which monetary damages are the only recovery. *Id.* at 2694. The opinion also rejected a requirement that attorneys' fees be conditioned on, or proportionate to, a monetary damages award. *Id.* at 2694, 2698. Although it noted that the amount of damages is relevant to the fee awarded, the opinion distinguished a civil rights action from private tort litigation because the civil rights plaintiff also vindicates "important civil and constitutional rights that cannot be valued in monetary terms." *Id.* at 2694. That vindication often can include important social benefits that are not reflected in nominal damages. Thus, a proportionality rule would focus the fee evaluation on only one result obtained. It would also undermine the legislative intent underlying the Act: providing adequate compensation to attorneys to encourage them to accept civil rights cases in which monetary recovery might be limited.

Justice Powell, concurring, did not interpret *Hensley*'s analysis as broadly as did the plurality. Nevertheless, he also did not reject the lodestar approach when plaintiff's only recovery is monetary damages. Instead, he implicitly used the lodestar when he wrote: "the most critical factor [in the *final* determination of fee awards] is the degree of success obtained." *Id.* at 2700 (Powell, J., concurring) (quoting *Hensley*, 461 U.S. at 436) (emphasis added). In considering the degree of success obtained, the concurrence recognizes that the court may weigh the vindication of constitutional rights in addition to the award of monetary damages. Justice Powell notes that the award of private damages will rarely be said to benefit the public interest to an extent justifying such disproportionality as existed between the damages and fees in *Rivera*. *Id.* at 2700 n.3. Nevertheless, he also states that neither history nor court decisions support a "rule" of proportionality. *Id.* at 2700. Thus, he seems to interpret *Hensley* to allow widely disproportionate fees in fewer cases than would the plurality. The concurrence requires particularly careful consideration of the amount of damages awarded in assessing fees but still allows a

court discretion to award fees greater than the damages in those cases in which the vindication of constitutional rights is an important element of success. Justice Powell was able to affirm the district court's decision in *Rivera* because the district court's findings of fact clearly explained the factors underlying its fee award, including the close relationship of the claims, counsel's skill in handling the case, the difficulty in pursuing the action, the excellent results achieved for plaintiffs and, in particular, the benefit to the public in the vindication of plaintiff's constitutional rights. *Id.* at 2699.

Therefore, following *Rivera*, we cannot assume the trial court erred despite the great disproportionality between the fee awarded and the damages recovered in the present case. Discretion to award fees lies ultimately with the district court. *Hensley*, 461 U.S. at 437. We must determine whether the court's findings of fact are clearly erroneous and, in light of those findings, whether the trial court abused its discretion in awarding the fee.

II.

The plaintiffs, who were awarded judgment, were clearly prevailing parties. Their fee request was for 180.5 hours at $125 per hour. The time records themselves were not disputed, only the compensation for services. Record, vol. 2, at 2-3. The district court began its evaluation of fees with the lodestar. In determining the reasonable amount of hours for litigation, the court discussed the difficulty for both counsel and the parties in bringing a civil rights action because of the delicate nature of relations among counsel, citizens, and the city and its representatives. The court also noted the extensive preparation required for a 1983 case and the difficulty in articulating a claim for relief. *Id.* at 5-6. Further, the court noted the ability of plaintiffs' counsel in civil rights litigation. Despite its consideration of those factors supporting counsel's work, the district court reduced the number of hours requested. It specifically stated the basis for that reduction: (1) certain aspects of a related state claim were separable from

the federal suit, and (2) only two of the four plaintiffs were successful. *Id.* at 7-8. Accordingly, the court found the reasonable number of hours requested to be 100. The court further found that $125 per hour was an appropriate rate and awarded plaintiffs $12,500 in fees. After reviewing the record, we do not conclude that the court's findings are clearly erroneous. The issue before us then is whether the trial court abused its discretion in not departing from the lodestar due to plantiffs' limited success.

As *Hensley* requires, after determining the lodestar, the court discussed the results plaintiffs had obtained. The amount of monetary damages in the present case was less important than the judgment against the police officers' conduct. The district court stated:

> [The judgment is] important for the police as well as for the plaintiffs because it gives us an indication through these representatives of the community of what standards of police conduct should prevail, and that serves—I hope that serves —as some guidance for the police with respect to how they perform their difficult task.

Id. at 8–9. Because the district court found that the most important aspect of the judgment was the vindication of plaintiffs' civil rights and its message to the police department, we cannot conclude that the trial court's award was an abuse of discretion.

Thus, we need not address whether the case before us is one which might fall between the plurality and concurring opinions. The district court has provided a record sufficient to satisfy the concurrence. We cannot find error in the detailed findings of fact concerning the lodestar and the nature of plaintiffs' success nor that the trial court abused its discretion in awarding the fee.

The trial court's judgment is AFFIRMED.

No. 83-2053, JEWELL NEPHEW, et al. v. THE CITY OF AURORA, et al.

BARRETT, Senior Circuit Judge, with whom TACHA and BALDOCK, Circuit Judges, join, dissenting:

Four black plaintiffs brought this 42 U.S.C. § 1983 lawsuit alleging that, motivated by racial discrimination, two white police officers serving the City of Aurora, in response to a late evening noise complaint, entered the residence of appellee Perkins and there assaulted, battered, bruised and falsely arrested plaintiffs. Sued were the City of Aurora, its Mayor and City Council and the two Aurora police officers. The plaintiffs charged that the police officers' alleged intentional racially discriminatory actions were in accord with customs and policies of the City of Aurora, its Mayor and City Council, which "permitted its officers to beat, batter, bruise and abuse its black citizens. . . . " (R., Vol. I, pp. 4, 9.) The facts were in sharp dispute. The police officers contended that it was they who were subjected to assault and battery at the hands of plaintiffs. Plaintiffs sought injunctive and declaratory relief and $2 million in damages, compensatory and punitive.

At the close of plaintiffs' case-in-chief, and upon motion for directed verdict, the City of Aurora, the Mayor and City Council were dismissed from the suit. We have held that "a directed verdict is justified 'only if the proof is all one way or overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.' " *Kiner v. Northcutt*, 424 F.2d 222, 223 (10th Cir. 1970). Furthermore, and significantly, the court eliminated injunctive and declaratory relief from plaintiffs' case. Appellees do not challenge those rulings. Thus, the case went forward only and exclusively for jury determination of the damages liability issue. The only *real* relief ever sought by the plaintiffs in this case was $2 million in damages, both compensatory and punitive. That was the posture of plaintiffs' case at all times.

The plaintiffs' complaint alleged the following "unlawful practices": The City of Aurora was intentionally engaged in unlawful deprivation of rights of black persons by utilizing its police

department to commit assaults and batteries upon black persons, to invade the privacy of black persons, to unlawfully arrest black persons and by refusing "to accord to black persons any respect for their rights as human beings and as citizens of the United States." Plaintiffs' Complaint, Par. 7. The complaint alleged that the defendant police officers (1) "invaded" the privacy of plaintiffs' home on the evening of May 26, 1979, and (2) while in the home "battered, bruised and assaulted" the plaintiffs and (3) further subjected plaintiffs to "outrageous conduct," placed plaintiffs in "grave fear and mental anguish" and "in fear of grave bodily harm or loss of life." These allegations, if supported by the evidence in the eyes of the jury, could have resulted in a substantial monetary award. But these allegations did not stand up against the defendants' testimony. The police officers testified that it was they who had had been subjected to assaults and batteries at the hands of the plaintiffs. It was in this context that the jury returned a compensatory damages award of $1.00 to only two of the four plaintiffs.

The majority opinion states that "the amount of monetary damages in the present case was less important than the judgment against the officers' conduct" in vindication of plaintiffs' civil rights and "its message to the police department." Slip Opinion, p. 9. [App. D, 26a]. What civil rights of the plaintiffs were violated? What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subject to assault and battery, false arrest and outrageous conduct. What, then, is the "message" the trial court and this court are conveying to the City of Aurora police officers? The question defies a logical, reasonable answer. It was *not* answered by the district court, except in general, undefined platitudes. If the police officers did wrong, they are left groping for guidance and direction.

This suit was at all times aimed solely at monetary damage relief. It utterly failed in that regard. Even so, the trial court

erroneously refused to consider the fact that plaintiffs Fulton and Perkins recovered only the $1.00 nominal damage award in fixing plaintiffs' § 1988 attorney fee award.[1]

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court made it clear that in determining a § 1988 fee award "[T]he extent of a plaintiff's success is a *crucial* factor," *id.* at 440 (underlining supplied) and "[w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* Here, the district court did not explain how the award of attorney fees of $12,500 was reasonable in light of the $1.00 nominal damage award to two of the four plaintiffs, well knowing that monetary relief was the only possible relief available on the evidence. The need for such an explanation was clearly spelled out in *Marek v. Chesny*, 473 U.S. 1 (1985). The Supreme Court there said:

> Section 1988 encourages plaintiffs to bring meritorious civil rights suits . . . Section 1988 authorizes courts to award only "reasonable" attorney's fees to prevailing parties. In *Hensley v. Eckerhart, supra*, we held that "the most critical factor" in determining a reasonable fee" is the degree of success obtained." *Id.* at 436. We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." Ibid.

473 U.S. at 11.

The plaintiffs in this case failed to present any evidence in support of their prayer for injunctive or declaratory relief. There

[1] "With respect to the amount of the award, I am governed by the Tenth Circuit opinion [*Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983)] . . . I also agree with it . . . It is not really so much how much money a jury decides to give . . . to award . . . as it is a determination in the court of law by a jury as to who was right under the circumstances, and labeling in this case the conduct of the police, these two police officers as it relates to these two plaintiffs who did prevail at trial, that in this circumstance the police were wrong. That's important." (R., Vol. II, p. 8.)

was no evidence of any unconstitutional policy or custom against blacks. The plaintiffs' evidence totally failed to support their allegations that the City of Aurora, its Mayor and City Council and its police department conspired to deny blacks any constitutional rights, let alone the right to be free from assaults, batteries and false arrests allegedly practiced upon them. The district court granted the motion for directed verdict made by the City, the Mayor and the City Council at the close of the plaintiffs' case-in-chief because there was *no* evidence to support any of the plaintiffs' civil rights allegations lodged against those defendants. Those allegations were in fact groundless and frivolous. The *only relief* the plaintiffs could have obtained based upon their evidence was damages, and then only against the individual police officers.

If in fact the jury had believed the testimony of the plaintiffs to the effect that they had been assaulted, beaten, bruised, subjected to outrageous conduct and false arrest by the police officers, certainly a substantial award of monetary damages would have been made. The jury was not confronted with the problem of fixing a damage award for deprivation of the plaintiffs' rights of free speech or due process. Had the jury believed that these plaintiffs had been assaulted, beaten, bruised and falsely arrested by the police officers the injury was readily ascertainable in money damages just as awards are made in common law tort actions. The $1.00 nominal damage award tells us only that the two police officers did something improper but insignificant in terms of the allegations lodged.

The attorney fee award in this case is 6,225 times greater than the nominal damages awarded the two plaintiffs. If there were significant constitutional principles at stake in this case requiring monetary vindication, obviously the plaintiffs failed to so impress the jury. Nothing in this record indicates what "important civil and constitutional rights that cannot be valued in monetary terms," *City of Riverside v. Rivera*, 477 U.S. 561 (1986), were involved here. Furthermore, neither the district court nor the

majority opinion have identified any important civil and constitutional rights vindicated by the $1.00 nominal damage awards in this case. Why? Because to do so necessarily means that the evidence must support the allegations that the police officers assaulted, beat, bruised and falsely arrested the plaintiffs. The $1.00 nominal damage award tells us in clear sounding language that the jury did not so find.

The *City of Riverside v. Rivera* case, unlike the case at bar, clearly served the "public interest." There, a large group of police officers entered a residence where a party was going on and, without arrest or search warrants, arrested the plaintiffs, who were Mexican Americans. Suit was brought under 42 U.S.C. § 1983 for damages, and for declaratory and injunctive relief to prevent further "discriminatory harassment against Mexican Americans." The jury returned 37 individual verdicts against the City and five police officers. The plaintiffs did not pursue their request for injunctive and declaratory relief, but the district court made it clear that had the plaintiffs asked for it, such relief would have been granted. The court entered judgment in the amount of $33,350 representing compensatory and punitive damages. Thereafter, the court awarded plaintiffs' attorneys fees in amount of $245,456.25. In upholding this award, the Supreme Court held that a § 1988 attorney fee award need not be proportionate to the damages awarded, although "results obtained" are a *critical factor.* In this regard, the court emphasized that the "public interest" had been served in preventing further discriminatory harassment of Mexican Americans. The district court found that the police officers' acts were motivated by a general hostility to the Chicano community and that the lawsuit was necessary to stop the unlawful institutional behavior involved in the case. In sharp contrast, no public interest has been identified by the district court or by the majority opinion in the case at bar. Significantly, in *City of Riverside,* Justice Powell, concurring, observed that where the suit is for private damages, the court must be guided by the success achieved.

I do not contend that there must be a yardstick guiding the district court in the allowance of attorney fees under § 1988. Here, however, the district court refused to consider the "success achieved" factor in this suit for damages even though the plaintiffs had won only nominal damages.[2] This was clearly wrong. The trial court erroneously relied upon the following *dictum* in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983):

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice.

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[2]Most circuits agree that in a case where a constitutional violation is specifically identified (unlike the instant case) and a party is awarded nominal damages, such a party is in fact a prevailing party for attorney fee award purposes. *Ganey v. Edwards*, 759 F.2d 337 (4th Cir. 1985) (Failure to award any actual or nominal damages did not prevent prisoner, who had been denied meaningful access to the courts, from being the "prevailing party" entitled to costs and attorney fees); *Fast v. School Dist.*, 712 F.2d 379 (8th Cir. 1983), rehearing *en banc*, 728 F.2d 1030 (1984) (Discharged teacher awarded $1.00 in nominal damages for specific showing of deprivation of property without due process of law in a class action is a "prevailing party" under 42 U.S.C. § 1988); *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981) (Plaintiffs who won jury verdict of $1.00 in a 42 U.S.C. § 1983 action were "prevailing parties" entitled to awards under § 1988 where court makes a positive finding of a violation of civil rights); *Huntley v. Community Sch. Bd. of Brooklyn*, 579 F.2d 738 (2nd Cir. 1978) (In civil rights action in which plaintiff recovered nominal damages of $100.00 for denial of procedural due process while conceding that termination of his employment was justified, there was no abuse of discretion in concluding that plaintiff at most won a "moral victory" of insufficient magnitude to warrant an award of attorney fees under 42 U.S.C. § 1988); and *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978) (The fact that plaintiff, a teacher discharged without notice or hearing constituting denial of procedural due process, may prevail on the merits yet recover only nominal damages shall in no way diminish his eligibility for attorney's fees under § 1988, though it is one of the factors properly to be considered on the amount of such award.)

The dictum in *Ramos v. Lamm*, which was the cornerstone of Judge McKay's dissenting opinion in *Nephew v. City of Aurora*, 766 F.2d 1464, clearly conflicts with express language in *Hensley v. Eckerhart* and *City of Riverside v. Rivera*. Significantly, Judge McKay does not cite to *Ramos v. Lamm* in his opinion for the *en banc* court, even though it was the basis for his dissent from the original panel opinion in this case and even though the district court stated that it was guided and governed by *Ramos v. Lamm*. (R., Vol. II, pp. 2, 8, 9.)

This case should be remanded to the district court as directed by a panel of this court in *Nephew v. City of Aurora, supra*, where we said:

> By this holding we do not imply that an award of nominal damages necessarily means that a corresponding fee award must also be nominal. However, where, as here, a plaintiff seeks substantial damages but wins only nominal damages, the award must be reduced to account for the plaintiffs' very limited success.[3]

766 F.2d at 1467.

(2)

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NO. 87-1038

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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NO. 87-1038

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October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

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JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. FACTURAL BACKGROUND OF THIS CASE

While the facts in Petitioner's brief are not necessarily incorrect, they are slanted and incomplete. This matter arose from alleged violations of the constitutional rights of the Respondents. Through the course of litigation, the Respondents attempted to establish that the violation of their constitutional rights by the two named police officers were part of a pattern and practice of the city of Aurora, through its Mayor and Police Department, to violate the constitutional rights of Black persons. It was in this context that the Respondents requested relief in the amount of $2,000,000.00. The Respondents were not able to establish the pattern and practice to the satisfaction of the trial court and those aspects of the claim were dismissed. The matter

then proceeded to the jury on the individual violations alleged by the Respondents. The Jury specifically found that the constitutional rights of Respondents Fulton and Perkins were violated by the two named police officers.

The Jury reached this verdict based on the presentation of evidence that showed that the two police officers had indeed come to Respondent Perkins' apartment to issue a summons for loud music. They found that after having done that, the police officers continued to harass and harangue Respondents Perkins and Fulton even though the record player had been turned down to an unobjectionable level. The Jury further found that the officers, after a series of verbal harassments of the Respondents, physically attacked, assaulted, and battered the persons of Respondents Fulton and Perkins. Based on these facts, the jurors unanimously held that Respondents' United States Constitutional rights, to be secure in their homes and persons, and from unlawful invasion thereof, were violated by the two named officers, who were acting under color of state law, custom or policy.

In charging the Jury, the Trial Court instructed that if they found that the United States Constitutional rights of the Respondents had been unlawfully violated, that the Jury had several options in providing monetary remedies. Among those options was the awarding of nominal damages. The Jury selected that option in finding for Respondents, Fulton and Perkins.

B. JUDGMENT OF THE DISTRICT COURT

In *Cary v. Piphus,* 435 U.S. 247, (1978), this Court held that nominal damages were sufficient to constitute a party as prevailing and thereby give rise to an award of both costs and attorney fees. Based on that guidance, which has been consistently reaffirmed by this Court, the Trial Court awarded attorney fees to the prevailing Respondents.

The Petitioners characterization of this victory by Respondents Perkins and Fulton as a "moral victory" belittles the impact of a finding of an intentional violation of the United

States Constitutional rights of the Respondents by these two police officers. To the Respondents this was the major purpose for the lawsuit. This fact was recognized by the Trial Court in rendering its decision on the attorney fee question. (*See* Petitioners' Brief, App. A, 3a, 6a, 7a). These same factors stated by the Trial Court in his ruling contributed greatly to the Respondents' inability to establish a class action lawsuit. At the close of Respondents' case, the Judge dismissed the City of Aurora, and its officials. With this dismissal, Respondents request for declartory and injunctive relief were no longer appropriate.

C. JUDGMENT OF THE CIRCUIT COURT OF APPEALS

Respondents agree with the processes through the Tenth Circuit Court of Appeals as indicated in Petitioners' Brief. Respondents point out, however, that the holding of the Tenth Circuit was that the two Respondents prevailed because they had established to the satisfaction of the Jury that their constitutional rights had been violated by the two police officers.

As is noted in the Court of Appeals en banc decision, Respondents counsel, after attempting to remove all of the hours related to unsuccessful claims, requested payment for 180.5 hours at $125.00 per hour. (*See* Petitioners Brief, App. D. 25a, 26a). The reasonable necessity of this expenditure of time was not questioned by the Petitioners at the Trial Court. This then was the "lodestar." The Trial Court, in considering the degree of success obtained, reduced the number of hours to 100 and awarded payment for those hours. (*See* Petitioners' Brief, App. A., 6a, 7a) The Court of Appeals approved this reduction in fees.

REASONS FOR DENYING THE WRIT

I. The issues raised by petitioners have been firmly decided by this Court and have been uniformly applied by the various Courts of Appeals.

The Court of Appeals applied the appropriate standard in determing that the Respondent's were prevailing parties entitled to an award of attorney fees and in affirming the District Court's particular award in this case.

As is indicated previously, this Court in *Carey v. Piphus, supra,* determined that a party who receives nominal damages is a prevailing party for purposes of an award of costs and attorney fees. That holding by this Court has not been disturbed and indeed, has been applied consistently since its announcement.

In *Hensley v. Eckerhart,* 461 U.S. 424, 76 L.Ed.2d 40 (1983) this court cited with favor *Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978). *Nadeau* held that "plaintiffs may be considered prevailing parties for attorneys fees purposes if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." 76 L.Ed.2d at 50. In stating the above, the Court noted that this is a generous formulation of the doctrine. In the within matter, the dominant and perhaps sole issue in litigation was, whether the constitutional rights of Respondents Fulton and Perkins had been willfully violated by the two named police officers while they were acting under color of state law. That issue was decided by the Jury in favor of Respondents Fulton and Perkins. The fact that the Jury chose to award nominal damages as opposed to the other alternatives does not in any way diminish the Jury's central finding that the constitutional rights of the Respondents had been violated.

This distinction, although not noted by Petitioners herein, was clearly noted by the Trial Court and by the Court of Appeals. Respondents so called "moral victory" was in fact a legal victory which acknowledged the violation of their constitutional rights. The Trial Court recognized this distinction and expressed it as follows:

> It is not really so much how much money a jury decides to give or I shouldn't say give — to award — as it is a determination in the court of law by a jury as to who is right under the circumstances, and labeling in this case the conduct of the police, these two police officers as it related to these two plantiffs who did prevail at trial, that in this circumstance the police were wrong. That's important.
>
> It's important for the police as well as for the plaintiffs because it gives us an indication through these representatives of the community of what standards of police conduct should prevail, and that serves — I hope that serves — as some guidance for the police with respect to how they perform their difficult tasks. (*See* Petitioners' Brief, App. A, 6a, 7a)

The Trial Court was clearly aware of the issue in litigation.

It is also significant that at every stage in these proceedings, Respondents were held to be the prevailing parties. The three judge panel that originally reversed the trial court recognized this fact and stated "we have no trouble finding the Plaintiffs in the instant case are prevailing parties even though they won only nominal damages, *see, e.g. Skoda v. Fontani,* 646 F.2d 1193 (7th Cir. 1981)." (Petitioners' Brief, App. B, 12a) Nor does there appear to be any question among the various courts of appeal that the award of nominal damages establishes a prevailing party.

In attempting to relegate Respondents victory to a "moral victory" Petitioners rely on *Huntley v. Community School Board of Brooklyn,* 579 F.2d 738 (2nd Cir. 1978). In that instance the appellate court approved the trial court's holding that: " . . . appellant at most had won a "moral victory" of insufficient magnitude to warrant an award under §, 1988." However, Petitioners failed to realize that in *Huntley* the second circuit refused to disturb the finding of the trial court because of absence of abuse of discretion. The Court made this clear in a later case. The Court of Appeals held in *Milwe v. Cavuoto,* 653 F.2d 80 (2nd Cir. 1981) relying on *Carey* and *Zarcone v. Perry,* 581 F.2d 1039 (2nd Cir. 1978), cert. denied, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979) that: " . . . even if fees were not awarded on the basis of *Milwe's* pendent state law claim, the one dollar assessed against Sergeant Savuoto on plaintiff's constitutional claim would be sufficient to support an award of fees under the Act."

Further, the court explained with reference to *Huntley:* "In that case *(Huntley),* the trial judge had applied the correct criteria and we simply found no abuse of discretion in his conclusion that the prevailing plaintiff has won 'only a moral victory' of insufficent magnitude to warrant an award under Sec 1988." In the instant case, Petitioners did not allege the abuse of discretion by the Trial Court and therefore the Writ of Certiorari should be denied. *See also Ganey v. Edwards,* 759 F.2d 337 (4th Cir. 1985); *Bradley v. Coughlin,* 671 F.2d 686 (1st Cir. 1982); *Pollock v. Baxter Manor Nursing Home,* 716 F.2d 545 (8th Cir. 1983); *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983); *Tatum v. House,* 642 F.2d 253 (8th Cir. 1981); *Hogue v. Clinton,* 791 F.2d 1318 (8th Cir. 1986), *cert. denied,* 107 S.Ct. 648, 93 L.Ed.2d 704 (1986); *Westborough Mall, Inc. v. City of Girardeau, Mo.,* 794 F.2d 330 (8th Cir. 1986), *reh'g. denied,* 804 F.2d 108 (1986), *cert. denied,* 107 S. Ct. 1373, 94 L.Ed.2d 688 (1987).

Clearly the existing legal authority, as announced by this Court, and by the various courts of appeal supports the findings of the courts below that Respondents were prevailing parties. Equally clear is the fact that the Trial Court properly considered the "results achieved" in fashioning its attorney fee remedy.

II. The award of the attorneys fees to Respondent was discounted by the trial court to compensate for limited success

In order to determine the appropriate attorney fee, the Trial Court held a hearing. Respondents counsel submitted to the Court an affidavit of fees. (*See* Appendix 1) After hearing arguments, the Trial Court noted that it was being guided by the Tenth Circuit's decision in *Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983) *Ramos* was announced with the benefit of this Court's decision in *Hensley.*

In *Hensley v. Eckerhart, supra,* on which the Petitioners rely and attempt to base much of their argument, this Court spoke specifically to these situations and gave the trial court the following guidance on whether and how the lodestar ought to be reduced:

> There is no precise rule or formula for making these determinations. The District Court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in the light of the considerations we have identified. 76 L.Ed.2d at 52.

The Trial Court herein was very much aware of this Court's holding in *Hensley* and indeed fashioned its ruling in accordance with *Hensley*. The Trial Court chose to reduce the award to account for the prevailing Respondents' limited success rather than to attempt to eliminate specific hours.

As is indicated in Appendix 1, Respondents' Counsel had removed from the attorney fee request, to the maximum extent possible, all hours relating to claims on which Respondents did not prevail. Included in the request were 34.9 hours that related to Respondents' efforts in the companion state court case that arose from the same incident. As Petitioners indicate in their brief and as the Trial Court indicated in its judgment, the two named police officers had previously filed a charge of assault and battery against the Respondents in Colorado state courts. This action came to trial prior to the State Court matter. This Court's decisions make it very clear that the Trial Court could have appropriately awarded Respondents' their attorney fees in the State action as well as the other hours for which it denied payment. *See Maine v. Thiboutot,* 481 U.S. 1. (1980). The Trial Court clearly followed the guidance of this Court and the applicable decisions of the Tenth Circuit Court of Appeals.

What the Trial Court did not do, and what Petitioners' urge, is to apply a rule of proportionality to Respondents' attorneys fees award. To this point, no court to whom Petitioners have turned has been willing to adopt such a rule. Instead the Trial Court

applied the factors that were enunciated by this Court in *Hensley*.

Upon its decision to reconsider this matter en banc, the Tenth Circuit Court of Appeals awaited this Court's decision in *City of Riverside v. Rivera*, 47 US _____, 91 L.Ed.2d 446, 106 S.Ct. _____ (1986) The concern of the Court was the question raised in *Rivera;* whether it was appropriate for a rule of proportionality to be applied in civil rights cases. Upon receipt of the decision in *Rivera* the Tenth Circuit Court of Appeals affirmed the judgment of the Trial Court.

A review of the decision of the Trial Court in this matter reflects that the Trial Court's Order is consistent with all three of the opinions in *Rivera*. Since This Court did not depart from its judgment as enunciated in *Hensley* when deciding *Rivera*, the Trial Court in applying *Hensley* also was consistent with This Court's opinion in *Rivera*.

In *Rivera*, Mr. Justice Brennan speaking for himself and three other Justices upheld the Trial Court's determination of an appropriate attorney fee in a situation where the attorney fees were considerably greater than the judgment that the Plaintiffs had been awarded.

Mr. Justice Brennan reviewed the *Hensley* decision and noted that the principles there were still valid. In the course of his ruling, Mr. Justice Brennan spoke specifically to the question of proportioning the attorney fee award based on the monetary had award received by a plaintiff.

> The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under Sec. 1988. See Johnson, 488 F.2d at 718. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under Sec. 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.
>
> As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued soley in

> monetary terms. See Carey v. Piphus, 435 U.S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in Sec. 1988, over and above the value of a civil rights remedy to a particular plaintiff . . ." Hensley, 461 U.S., at 444, n4 (Brennan, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. *Rivera,* 91 L.Ed.2d at 479-480.

It is significant that the Trial Court noted herein the extra judicial effect of the Jury's verdict wherein it would provide guidance to police officers in the future as well as provide the appropriate means for resolving such disputes.

Mr. Justice Powell filed a concurring opinion which also adhered to this Court's decision in *Hensley.* Mr. Justice Powell spoke directly to the question of proportionality and stated as follows:

> Petitioners argue for a rule of proportionality between the fee awarded and the damages recovered in a civil rights case. Neither the decisions of this Court nor the legislative history of Sec. 1988 support such a "rule." The facts and circumstances of litigation are infinitely varible. Under Hensley, of course, "the most critical factor [in the financial determination of fee awards] is the degree of success obtained." 461 U.S., at 436. Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered.
> *Rivera,* 91 L.Ed.2d at 486.

The recovery the Respondents' sought was very clearly vindication of their constitutional rights. If the Respondents had only been interested in monetary damages they could have filed a suit in state court based on assault and battery. Instead they contended throughout the course of the litigation that their basic fundamental constitutional rights had been violated by the two named police officers and asked the jury to vindicate those

constitutional rights. The jury did so.

Mr. Justice Rehnquist, in a dissenting opinion in which he was joined by the Chief Justice and two other Justices, also affirmed the Court's holding in *Hensley*. Mr. Justice Rehnquist reaffirmed the lodestar approach announced in *Hensley*. He based his dissent on the fact that he did not believe that the hours spent by Rivera's attorneys were "reasonably" spent. The attorneys in *Rivera* requested payment for 1946.75 hours. The Trial Court had awarded attorney fees for the entire amount of time. Mr. Justice Rehnquist reviewed the specifics of some of the time charged by the attorneys. He expressed the opinion that many of the hours were not reasonably spent and concluded his analysis by stating:

> The plurality, . . . explains the position advanced by Petitioner and the Solicitor General concerning fee awards in a case such as this, and then goes on to "reject the proposition that fee awards under Sec. 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." . . . I agree with the plurality that the importation of the contingent fee model to govern fee awards under Sec. 1988 is not warranted by the terms and legislative history of the statute. But I do not agree with the plurality if it means to reject the kind of "proportionality" that I have previously described.
>
> ****
>
> In Hensley, we noted that "complex civil rights litigation involving numerous challenges to institutional practices or conditions" might well require "many hours of lawyers' services," and thus justify a large award of attorney's fees . . . This case is a far cry from the situation we referred to in Hensley. [citations omitted] *Rivera*, 91 L.Ed.2d at 492-493.

While Mr. Justice Rehnquist did not specifically reject proportionality, it is clear that he did not adopt proportionality. Instead he based his decision on the reasonableness of the hours for which the Trial Court had permitted payment to Rivera's attorneys.

Very clearly such a situation does not exist in the within matter. The lodestar in this case was the product of 180.5 hours at $125.00 per hour. A review of the hourly charges reflected in

Appendix 1 makes it very clear that there were no situations in which an inordinate amount of time was charged to any particular function. Instead each of the tasks reflects time reasonably expended for the task performed.

The Trial Court after determining the lodestar 180.5 hours at the rate of $125.00 per hour, decided that the fees should be reduced on the basis of the results achieved. Accordingly the Trial Court awarded payment of 100 hours at the rate of $125.00 per hour. This is clearly in keeping with this Court's decisions in *Hensley* and *Rivera*, as the Tenth Circuit Court of Appeals so held.

III. The District Court's ruling is clear and concise and is in keeping with the law as enunciated by this Court

The District Court, in its opinion, expressed an awareness of the principles governing its decision to award attorney fees to a prevailing plaintiff. The District Court recited its awareness of *Ramos v. Lamm*. In *Ramos* the Tenth Circuit had specifically stated that more specific guidelines were necessary for Trial Courts to determine appropriate attorney fee awards. The Tenth Circuit stated "in this endeavor we are aided by the Supreme Court's recent decision in *Hensley v. Eckerhart.*" *Ramos*, 713 F.2d at 557.

The District Court explained its reasons for the fee award, citing the potential for great violence in a community that arises from the kind of police misconduct practiced at Respondents' expense. It noted the propriety of resolving these matters in a court of law rather than having them erupt into episodes of major disobedience and destruction. (*See* Petitioners' Brief, App. A. 3a) The Court also noticed specifically that it was required to measure "the question of how much success was achieved." The Court proceeded to perform that function and adjusted the lodestar accordingly. The Court also took into account the experience of Plaintiffs' counsel in dealing with these matters. (*See* Petitioners' Brief, App. A, 5a)

In summary the District Court's ruling was very clear, very concise and in compliance with the holdings of this Court as well as the Tenth Circuit Court of Appeals.

IV. The Court of Appeals decision is consistent with the decision of this Court.

The Respondents note with favor the citation in Petitioners' Brief (at 13) of a quote from the Tenth Circuit Court of Appeals in *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) (en banc).

Petitioners have, in their own minds, determined that the only purpose for the lawsuit was for monetary award. They continue to overlook the seriousness of a violation of a person's constitutional and civil rights. The Court of Appeals, as did the Trial Court, recognized that this was a matter brought to the courts for vindication of such rights. In reviewing the action of the Trial Court, the Court of Appeals appropriately determined that the Trial Court had followed existing law in reaching its decision in relation to the award of attorney fees in the within matter.

CONCLUSION

For the reasons indicated herein the Respondents urge that this Court deny the Petitioners' Petition for Writ of Certiorari. The record before this Court clearly demonstrates that the courts below appropriately applied the law as enunciated by This Court.

There are no issues raised in this Petition that have not already been decided by This Court. There is no indication that the various circuits are deciding the matter raised in this Petition in any ways that are inconsistent with the decision of the Tenth Circuit Court of Appeals. Uniformly, the decisions Respondents have reviewed from the various Courts of Appeals indicate that all have recognized that this Court has not imposed a rule of proportionality in civil rights attorney fee cases.

Respectfully submitted,
TRIMBLE, TATE & NULAN

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(303) 839-1572

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(303) 449-3891

CERTIFICATE OF SERVICE

I, Joseph C. French, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of March, 1988, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioners, City of Aurora, et al, by depositing copies in the United States Post Office located at 1823 Stout St., Denver, Colorado with first class postage prepaid, and properly addressed to their counsel of record:

Marcia G. O'Brien
Office of The City Attorney
1470 S. Havana Street, #820
Aurora, Colorado 80012

JOSEPH C. FRENCH
720 Pearl Street
Boulder, Colorado 80302
Telephone: (303) 449-3891
Attorney for Respondents

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
For the District of Colorado

Civil Action No. 81JM116

JEWELL NEPHEW,
et al.,

Plaintiffs,

v.

CITY OF AURORA,
et al.,

Defendants.

MOTION FOR ATTORNEY FEES AND COSTS

COME NOW the Plaintiffs, Fulton and Perkins, by their attorneys, TRIMBLE, TATE & NULAN, and move this Honorable Court to award attorney fees and costs as herein indicated.

1. Attached hereto is an Affidavit signed by undersigned attorney indicating the hours expended in pursuit of this matter on behalf of Plaintiffs Fulton and Perkins. The Affidavit totals 180.5 hours. All hours attributable soley to either Plaintiffs Nephew or Neloms have been removed and are not included in this total. The hourly rate for civil rights matters presently charged by the undersigned attorney is $125.00 per hour. At the time the undersigned attorney was retained, in May, 1979, his hourly rates for civil rights matters was $90.00 per hour. Beginning January 1, 1981, the undersigned attorney raised his rates for civil rights matters to $110.00 On January 1, 1983, undersigned counsel raised his rates to $125.00 per hour. Counsel believes that he is entitled to payment at his current hourly rate resulting in an attorney fee request in the amount of $22,562.50.

2. Undersigned counsel also advises the Court that the total hours indicated above include 34.9 hours of time expended exclusively for an action in state court arising from the same incident. The Plaintiffs herein were Defendants in the state court; and by means of a counterclaim, they alleged a violation of 42 U.S.C. 1983. The cases were waged simultaneously. Almost without exception, the actions taken in one case were useful in terms of the other case. The parties hereto are agreed that the decision of the jury in this matter renders moot the state proceedings and have agreed to dismiss those proceedings without any further actions. The Plaintiffs believe that they are entitled to attorney fees for the hours expended in that case, as well as the within case. And those hours are included in the total.

3. Plaintiffs incurred the following costs in pursuit of this action:

filing fee	$60.00
service charges (process)	46.64
expert witness:	
Dr. Kowalski	250.00
	356.64

WHEREFORE, Plaintiffs Fulton and Perkins pray that the Court enter judgment to include the amounts indicated above as costs taxable against the Defendants.

TRIMBLE, TATE & NULAN

By _____

PENFIELD W. TATE, II, 4681
Attorneys for Plaintiffs
Perkins and Fulton
1700 Broadway, Suite 701
Denver, Colorado 80290-0799
839-1572

CERTIFICATE OF MAILING

I certify that on May 28th, 1983, I sent a true copy of the foregoing pleading, sufficient postage prepaid, through the U.S. mail service, to: ROBERT A. DULL, Attorney, 700 E. Speer Blvd., Denver, Colorado 80203

and to : CHARLES RICHARDSON, JR., Attorney, 1470 South Havana Street, Suite 820, Aurora, Colorado 80012.

IN THE

UNITED STATES DISTRICT COURT

For the District of Colorado

Civil Action No. 81JM116

JEWELL NEPHEW,
et al.,

Plaintiffs,

v.

CITY OF AURORA,
et al.,

Defendants.

AFFIDAVIT OF PLAINTIFFS' ATTORNEY RE ATTORNEY FEES

STATE OF COLORADO)
) ss.
City and County of Denver)

I, PENFIELD W. TATE, II, being of lawful age and having first been duly sworn, depose and say:

1. I am counsel for Plaintiffs in the above action.

2. I certify that the Time Record attached hereto is a true representation of the hours incurred by me in order to represent the Plaintiffs in this action, according to my best knowledge, information and belief.

Date: _____

TRIMBLE, TATE & NULAN

By _____
PENFIELD W. TATE, II, 4681
Attorneys for Plaintiffs
1700 Broadway, Suite 701
Denver, Colorado 80290-0799
839-1572

Subscribed and sworn to before me this _____ day of May, 1983.

My commission expires: _____

Fulton, et al, v. Peterson and Thomas

Civil _____

TIME RECORD

1979:

Jan. 25	4.0 hrs.	consultation w/ client & warrants
May 29	2.0 hrs.	consultation with client
June 27	2.1 hrs.	letter to City of Aurora
July 1-31	1.7 hrs.	consultation with clients
Sept. 1-15	15.0 hrs.	research Sec. 1983, et al.
Sept. 25	5.0	motions for extensions
Oct. 7	3.3 hrs.	research & pre. motions—remove

1980:

March 15	2.5 hrs.	research & filing on Change of Venue
	1.3 hrs.	hrg. Change of Venue (denied)
Aug. 4	3.2 hrs.	prep of Response & Conterclaim
Aug. 15	1.6 hrs.	prep of Motion to Add Parties

1981:

April 4	1.2 hrs.	appear, for Motion to Add Parties (Plain.) (denied)
April 23	2.3 hrs.	prep. for & hrg. of Motion to Add Plaintiffs
May 19	2.6 hrs.	prep. & filing Complaint & ff
Aug. 6	10.3 hrs.	research & prep. of resp. to Motion to Dis.

1982:

March 17	2.1 hrs.	review of interrogatories
May 7	2.0 hrs.	Pretrial Conf.
May 12	4.3 hrs.	prep. pretrial Order and con.
May	.7 hrs.	interrogatories to Defts.
June 3	1.8 hrs.	resp. to Motion for Judgment on Plaintiffs
June 7	6.0 hrs.	Fulton answers interrogatories
June 11	3.0 hrs.	deposition Fulton
July	1.3 hrs.	Sanctions on Perkins
Aug. 13	4.5 hrs.	Perkins answers to Interrogs.
Aug. 17	3.0 hrs.	Perkins deposition
Aug. 18	4.0 hrs.	Pre. witn trial, Arapahoe
Aug. 19	4.0 hrs.	trail & mistrail, Arap.
Oct. 3	1.2 hrs.	review of Defts. answers to interrogatories

1983:

April 1	3.0 hrs.	review of file, prep. of 30 day status report
April 11	2.5 hrs.	Motion in Lemine and Production of
April 12	2.0 hrs.	Motion in Lemine re witnesses
April 18	6.0 hrs.	response to Motion to Dismiss
April 21	1.0 hrs.	hearing on motions
April 23	3.0 hrs.	trial prep. Fulton
April 24	2.5 hrs.	trial prep. Perkins
April 24	2.0 hrs.	interview Dr. Kowalski
April 25-29	20.0 hrs.	Research, trial preparation
May 2-5	22.0 hrs.	jury instructions, voir dire
	10.5 hrs.	misc. letters and correspondence

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1038

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

Office of the City Attorney
CHARLES H. RICHARDSON
City Attorney
MARCIA G. O'BRIEN*
Assistant City Attorney
1470 S. Havana Street, Suite 820
Aurora, Colorado 80012
Telephone: (303) 695-7030
Counsel for Petitioners

*Counsel of Record

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NO. 87-1038

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

It is undisputed that the issues presented to the jury in this case stem from a late evening noise complaint received by the Aurora Police Department. Beyond that, the facts are in sharp dispute.

It is important to understand what this case is *not* about. It is not a class action lawsuit, nor a lawsuit seeking declaratory and injunctive relief. Rather, the case proceeded to jury determination under 42 U.S.C. § 1983 based solely on Respondents' damage liability claim.

Respondents' Brief can be read to imply that Respondents were unable to establish a class action after a hotly contested trial.

(Respondents' Brief, 3). In actual fact, the class action allegations were dismissed as a result of Petitioners' Motion to Dismiss, more than a year prior to trial.

Respondents state that they "were not able to establish the pattern and practice to the satisfaction of the trial court and those aspects of the claim were dismissed." (Respondents' Brief, 1). More accurately, because Respondents made no attempt in their case in chief to prove the requisite custom or policy, at the close of Respondents' case the district court granted the City, Mayor, and the City Council's motion for directed verdict and eliminated Respondents' claims for declaratory and injunctive relief.

Simply stated, Respondents seek to obfuscate the fact that only Respondents' claims for compensatory and punitive damages in the amount of two million dollars against the two police officers reached the jury, and that this case should properly be considered one for private damages.

In addition, Respondents imply that Respondents Fulton and Perkins each received favorable verdicts against the two police officers.[1] (Respondents' Brief, 2, 3). That was not the case. Plaintiff Fulton received a favorable verdict against Officer Peterson alone. Plaintiff Perkins received a favorable verdict against only Officer Thomison.

Respondents allege that the jury "found that the officers, after a series of verbal harassments of the Repondents, physically attacked, assaulted, and battered the persons of Respondents Fulton and Perkins." (Respondents' Brief, 2). The sole purpose of Respondents' unsupported and inaccurate characterization of

[1]Apparently, Respondents seek to blur the clear distinction between this case and *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), where the jury returned 37 individual verdicts in favor of the plaintiffs and against the City of Riverside and five police officers, and plaintiffs were awarded $33,350.00 in compensatory *and* punitive damages.

the jury's findings is to inflame. Further and more importantly, Respondents' mischaracterization strains credibility.

The verdict forms are found in Appendices A and B. If the jury had, in fact, determined that the conduct of the two police officers was so outrageous, how do Respondents account for the award of only one dollar each to Respondents Fulton and Perkins? As Senior Circuit Judge Barrett stated in the dissenting opinion (Petition for Writ of Certiorari, App. D, 28a):

> . . . What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subjected to assault and battery, false arrest and outrageous conduct.

REASONS FOR GRANTING THE WRIT

I. The Standard Applied By The Court Of Appeals To Determine Whether Respondents Were Prevailing Parties Entitled To An Award Of Attorney's Fees Cannot Be Reconciled With *Hensley* Or With Other Circuits' Interpretation Of *Hensley*.

Respondents contend that in *Carey v. Piphus*, 435 U.S. 247 (1978), this Court determined that a party who receives nominal damages is a prevailing party for purposes of an award of costs and attorney's fees. Respondents conveniently overlook the fact that *Carey* dealt with a procedural due process violation. In this case, Respondents did not assert a procedural due process claim.

In *Carey*, this Court explained the special nature of a procedural due process violation, stating "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." 435 U.S. at 266. No subsequent Supreme Court decision has elevated substantive due process claims of the type found in this excessive force case to the level of an "absolute" right found to have existed in *Carey*.

In *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), this Court reaffirmed that *Hensley v. Eckerhart*, 461 U.S. 424 (1983), indicates the factors to be considered in awarding attorney's fees under 42 U.S.C. § 1988. In *Hensley*, this Court explicitly stated that one "important factor" in determining the "reasonableness" of a fee award is the "result obtained". 461 U.S. at 434.

Respondents' argument that the issues raised by Petitioners have been decided by this Court and have been uniformly applied by the various Courts of Appeals is further weakened by Respondents' reliance upon *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Respondents state (Respondents' Brief, 6):

> . . . After hearing arguments, the Trial Court noted that it was being guided by the Tenth Circuit's decision in *Ramos*. *Ramos* was announced with the benefit of this Court's decision in *Hensley*. (Citation omitted).

The language in *Ramos*, however, clearly conflicts with the express language of *Hensley* and *Rivera*. Apparently, Judge McCoy recognized this as he did not cite *Ramos* in his opinion for the en banc court, even though *Ramos* was the basis for his dissent from the original panel opinion and the district court stated that it was guided by *Ramos*.

Accordingly, the Tenth Circuit's opinion conflicts with this Court's holdings in *Hensley* and *Rivera*. In addition, the *Hensley* decision has not been applied uniformly by the Courts of Appeals. This Court's review is necessary to resolve this conflict, and to address the lack of uniform application of the *Hensley* decision.

II. Assuming *Arguendo* That Respondents Are Prevailing Parties, The Award Of Attorney's Fees Must Be Discounted To Compensate For Their Very Limited Success.

In arguing that the award of attorney's fees was discounted by the trial court for the limited success achieved, Respondents ap-

parently concede that their award of attorney's fees must be discounted to compensate for their very limited success.

Respondents incorrectly contend that after determining the "lodestar" at 180.5 hours, the trial court decided that the attorney's fees should be reduced on the basis of the results achieved. (Respondents' Brief, 11). A review of the "Time Record" submitted by the Respondents in support of their Motion for Attorney's Fees and Costs reveals that this is simply not the case. (Respondents' Brief, Appendix 1, 7a).

Initially, the total number of hours claimed on the "Time Record" is 170.5 hours, not 180.5 hours as stated by Respondents. Petitioners filed a Statement in Opposition to Plaintiffs' Certificate of Attorney's Fees. (R., Vol. I, p. 33). In their Statement in Opposition, Petitioners argued for the deletion of any time spent exclusively on the state case[2], which was calculated to be 57.1 hours by Petitioners, and for the deletion of 10.5 hours for "miscellaneous letters and correspondence". If those deductions are made, Respondents' claimed hours are reduced to 102.9 hours. In other words, the district court reduced or "rounded off" Respondents claimed hours by only 2.9 hours to arrive at the 100 hour figure. This "rounding off" of only 2.9 hours allowed Respondents to receive an award of attorney's fees which was 6,225 times the damage award in the case.

The extremely limited success achieved by the Respondents bears no reasonable relationship to the amount of attorney's fees awarded and demonstrates conclusively that the district court not only failed to give "primary consideration" to the "results obtained" factor set forth in *Hensley*, but refused to give this crucial factor any consideration whatsoever.

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[2]The police officers initially filed suit against Respondents in state court and Respondents counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

III. The Court of Appeals' Decision Will Undermine The Purposes Underlying 42 U.S.C. § 1988.

Respondents cite with favor the quotation from *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc), which is found on Page 13 of the Petition for Writ of Certiorari. (Respondents' Brief, 12). Petitioners cited *Cooper* for its discussion of the purposes underlying 42 U.S.C. § 1988. Respondents apparently concede that the twin purposes of 42 U.S.C. § 1988 are to provide meaningful access to the judicial process by individuals with civil rights grievances, and to force attorneys to critically evaluate the prospects of success of their claims.

Respondents, however, seek to divert attention from the lack of success of their claims and to convince this Court that their only purpose in filing suit in federal court was to vindicate their constitutional rights. In their Brief they state, " . . . [i]f the Respondents had only been interested in monetary damages they could have filed a suit in state court based on assault and battery." (Respondents' Brief, 9).

Respondents fail to mention that the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, contains limits of liability of $150,000 per plaintiff, or $400,000 in the aggregate. Thus, in a state lawsuit, Respondents would have been precluded from seeking two million dollars in monetary relief.

This lawsuit was not aimed at creating new law; rather, it was aimed solely at obtaining significant monetary damages for the Respondents. That goal was not achieved. By refusing to consider the "results obtained" factor set forth in *Hensley* and reaffirmed in *Rivera*, the Court of Appeals' decision undermines one of the purposes underlying 42 U.S.C. § 1988, which is to force attorneys to critically evaluate the prospects of success of their claim.

If the delicate balance between the twin purposes underlying 42 U.S.C. § 1988 is destroyed, there is nothing to prevent the

assessment of unconscionable attorney's fee awards in civil rights cases where monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

CONCLUSION

This case presents the Court with an ideal opportunity to further define the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988.

Respectfully submitted,

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*Counsel of Record

CERTIFICATE OF SERVICE

I, Marcia G. O'Brien, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-second day of March, 1988, I served copies of the foregoing Petitioners' Reply Brief in Support of Their Petition for Writ of Certiorari on Respondents, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, by depositing copies of Petitioners' Reply Brief in Support of Their Petition for Writ of Certorari in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to their counsel of record:

Joseph C. French
720 Pearl Street
Boulder, Colorado 80302

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The City of Aurora, by and through its Mayor and City Council, Stan Thomison and Kenneth L. Peterson

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-816

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON,
Plaintiffs,

vs.

STANLEY THOMISON and KENNETH PETERSON,
Defendants.

VERDICT FOR PLAINTIFF CHARLES FULTON

We the jury upon our oath do say that we find for the plaintiff Charles Fulton and against the following defendants:

Stanley Thomison: _____
(yes or no)

Kenneth Peterson: _____
(yes or no)

We fix compensatory damages at $_____.

On the separate question of punitive damages, we find as follows:

Stanley Thomison: $_____

Kenneth Peterson: $_____

Dated: _____

_____
Foreperson

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-816

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS and CHARLES FULTON,
Plaintiffs,

vs.

STANLEY THOMISON and KENNETH PETERSON,
Defendants.

VERDICT FOR PLAINTIFF RAFUS PERKINS

We the jury upon our oath do say that we find for the plaintiff Rafus Perkins and against the following defendants:

Stanley Thomison: _____
(yes or no)

Kenneth Peterson: _____
(yes or no)

We fix compensatory damages at $_____

On the separate question of punitive damages, we find as follows:

Stanley Thomison: $_____

Kenneth Peterson: $_____

Dated: _____

_____
Foreperson